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United Nations Commission on International Trade Law
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Summary record of the 823rd meeting
Held at Headquarters, New York, on Tuesday, 27 June 2006, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

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06-40853 (E)

The meeting was called to order at 10.15 a.m.

The discussion covered in the summary record began at 10.40 a.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders (*continued*) (A/CN.9/605)

Chapter IV bis. Interim measures and preliminary orders (*continued*)

Section 5. Court-ordered interim measures (*continued*)

Article 17 undecies. Court-ordered interim measures (*continued*)

1. **The Chairman** invited the Commission to resume consideration of article 17 undecies.

2. **Mr. Castello** (United States of America) proposed replacing article 17 undecies with the following text: "A court shall have the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings in the courts, including in cases where the place of the arbitration proceedings is in a country other than the court's. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration." Several delegations had worked on that proposal with the aim of conveying the same message as that contained in the current draft article but using clearer language. Unlike the text proposed by the representative of Mexico at the previous meeting, his proposal did not confer additional powers on the courts.

3. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said he understood that the rationale of the article was to ensure that a court's powers to order interim measures were not affected or diminished by the fact that arbitration proceedings were pending in the country or elsewhere or by the fact that interim measures had been ordered by an arbitral tribunal. Given that such situations had arisen in several countries, the objective of the article was to prevent the problems that had ensued. His delegation would therefore have preferred the following wording: "The powers of a court shall not be diminished by the fact that the dispute on the merits is submitted to arbitration and that an arbitral tribunal seized of that dispute has ordered interim measures." His delegation would, however, support the United States proposal provided that the explanatory material clarified that the provision did not extend the powers of courts in arbitration matters.

4. **Mr. Möller** (Observer for Finland) said that the Mexican proposal appeared to change the substance of the original article by extending the powers of the courts, which could contravene internal rules of civil procedure. The United States proposal was preferable as it did not differ in meaning from the original draft article 17 undecies. On the understanding that there was no intention to extend courts' current powers, his delegation would support the proposal.

5. **Mr. Uzelac** (Croatia) supported the wording proposed by the representative of the United States. The paragraph would, however, be more comprehensible if it was more appropriately placed in the Arbitration Model Law, for example in article 9, on arbitration agreement and interim measures by court.

6. **Ms. Kirby** (Observer for the International Chamber of Commerce) and **Mr. Özsunay** (Turkey) supported the United States proposal and said that the comments of the observer for the Swiss Arbitration Association should be reflected in the explanatory material.

7. **Mr. Boulet** (Belgium) said that, while his delegation supported the United States proposal, the words "including in cases where the place of the arbitration proceedings is in a country other than the court's" should be deleted. If the United States proposal was adopted, article 1, paragraph 2, of the Arbitration Model Law would require amendment to include article 17 undecies in the list of exceptions. The phrase he had cited from the United States proposal would therefore be superfluous, since the idea it conveyed would already be stated in the amended article 1, paragraph 2. Moreover, the list of exceptions in article 1, paragraph 2, included article 9, which specified that a party could address a State court to

request an interim measure but did not repeat the notion that that provision was applicable whether the place of arbitration was in a State territory or not. It was therefore inconsistent to include the phrase he had cited in article 19 undecies. His delegation endorsed the suggestion by the representative of Croatia to move article 17 undecies to article 9, paragraph 2, since the provisions that referred to interim measures ordered by a State jurisdiction would thus be grouped together.

8. **Mr. Dervaird** (United Kingdom) supported the United States proposal and endorsed the observations of the representative of Croatia.

9. **Mr. Bellenger** (France) said that his delegation favoured the wording proposed by the representative of the United States. The phrase "including in cases where the place of the arbitration proceedings is in a country other than the court's" should be maintained in order to encourage national judges to support national arbitration proceedings. Moreover, some of the wording proposed by the representative of Mexico, namely "a competent court may issue interim measures in connection with arbitration proceedings which have a seat either within or outside its jurisdiction", was useful in that connection.

10. **Mr. Komarov** (Russian Federation) supported the United States proposal. He also agreed that the article should be placed in article 9, paragraph 2, and that the comments of the observer for the Swiss Arbitration Association should be reflected in the explanatory material.

11. **Mr. Graham Tapia** (Mexico) withdrew the proposal on article 17 undecies that his delegation had made at the previous meeting.

12. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said it was important to clarify that the article under consideration regulated interim measures, not *juges d'appui*. Since the powers conferred in the article concerned interim measures, the judges involved were those responsible for issuing such measures. Care should be taken to ensure that that provision did not introduce the possibility of court officials the world over considering themselves to be *juges d'appui*.

13. **Mr. Li** Wenshu (China) said that his delegation supported the United States proposal.

14. **The Chairman** recalled that support had been shown for the suggestion of the representative of Croatia that the provision currently contained in article 17 undecies should become the second paragraph of article 9 of the Arbitration Model Law. There had also been some debate as to whether or not the reference to arbitration proceedings whose place was in a country other than the country of the court should be retained.

15. Furthermore, the representative of France and the observer for the Swiss Arbitration Association had raised the issue of the conflict between the *juge d'appui* and the judge issuing an interim measure. However, since the article very clearly referred to interim measures, that conflict did not arise. Moreover, the interplay between articles 5 and 6 of the Arbitration Model Law clearly established the powers and limitations of arbitration judges.

16. **Mr. López** (Chile) said that he supported both the proposal to make the provision currently included in the text as article 17 undecies a paragraph of article 9 of the Arbitration Model Law and the proposal to delete the repetitions in the text.

17. **Mr. Markus** (Switzerland) said that his delegation endorsed the United States proposal regarding article 17 undecies and the proposal to include the comments of the observer for the Swiss Arbitration Association in an explanatory note. Although he had no strong opinion, he would prefer to retain the reference to "a country other than the court's", for the sake of clarity. However, it might then prove necessary to amend the reference in article 1, paragraph 2, of the Arbitration Model Law, as proposed by the Belgian delegation. Since, in the present context, the Committee was not dealing with the question of the *juge d'appui*, the text proposed by the United States delegation should be retained.

18. With respect to the placement of the provision in article 17 undecies, he pointed out that article 9 was contained in chapter II, which dealt with the arbitration agreement itself. Moreover, article 9, unlike article 17, addressed the party to the arbitration agreement, not the arbitral tribunal. Article 17 in fact addressed the arbitral tribunal and its jurisdiction. His delegation did not have strong feelings about the placement of the provision currently contained in article 17 undecies, but would prefer to keep it where it was.

19. **Ms. Perales-Viscasillas** (Spain) endorsed the comments of the representative of Switzerland concerning the placement of the provision contained in article 17 undecies.

20. **Mr. Cosman** (Canada) said that his delegation supported the text proposed by the representative of the United States, without the further amendments proposed by other representatives. It also supported the inclusion of an explanatory note clarifying that the article should not be construed to extend the powers of the court to interference in international arbitration.

21. **Mr. Castello** (United States of America) said that his delegation wished to associate itself with the remarks made by the representatives of Switzerland and Spain on the question of the placement of article 17 undecies. From a structural standpoint, it might make more sense to keep the provision under a chapter heading referring to interim measures and preliminary orders, even though it might logically appear to belong in article 9.

22. **The Chairman** said that, if he heard no objection, he would take it that the Committee wished to adopt the text proposed by the United States delegation, to include the proposed clarifications in the explanatory material, and to leave the provision in its current place as article 17 undecies.

23. *It was so decided.*

Article 17 septies. Disclosure (*continued*)

24. **The Chairman** invited the Committee to resume its consideration of article 17 septies of the draft legislative provisions on interim measures and preliminary orders.

25. **Mr. Schneider** (Observer for the Swiss Arbitration Association) recalled that a number of delegations had been troubled by the provisions of article 17 septies and by its disclosure obligation, which was alien to some legislative systems. The best course of action would therefore be to find a compromise between the different approaches.

26. In view of the diverse situations that might form the basis of an application or order, it would be difficult to regulate the question generally. He would therefore propose that article 17 septies should be retained in its present form, but that the words "If so ordered by the arbitral tribunal", should be inserted at the beginning of paragraph (1).

27. Since the present wording did not make clear for the party concerned that the requirement was for notification of changes in the circumstances which were used as the basis for requesting the measure, perhaps some clarification would be needed. However, if it was provided that the tribunal must order the measure, then the particular circumstances of each case could be taken into account.

28. **Mr. Castello** (United States of America) said that his delegation did not object to the proposal of the Swiss Arbitration Association, which, by giving arbitral tribunals the same power as was contemplated in the existing text and allowing tribunals to tailor the provision to specific circumstances, seemed to answer the concerns of many delegations.

29. Because the language in article 17 septies seemed to be a little too broad, his delegation would propose that the words "or granted" should be deleted from the end of paragraph (1), and replaced with the words "if it becomes aware of such a change". The effect of that amendment would be to limit the obligation to the facts of which the party became aware.

30. The amended paragraph would therefore read: "If so ordered by the arbitral tribunal, the party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested if it becomes aware of such a change."

31. Lastly, although Mexico had previously suggested that the duty to inform should be further restricted to the circumstance where only the party making the request was aware of the change in facts, he felt that such a solution would not be workable because its effects would be too cumbersome.

32. **Mr. Möller** (Observer for Finland) said that his delegation supported the addition of the words "If so ordered by the arbitral tribunal". However, he was not sure whether the addition of the words "if it becomes aware of such a change" was necessary, as their meaning appeared to be implicit in the existing text.

33. **Ms. Perales-Viscasillas** (Spain) said that her delegation agreed with the proposal to introduce the words "If so ordered by the arbitral tribunal", but also agreed with the observer for Finland that the meaning of the words "if it becomes aware of such a change" was implicit in the existing text. Moreover, the addition of those words might create uncertainty, which could give rise to problems in practice.

34. **The Chairman** said that a new proposal relating to paragraph (1) of article 17 septies had been put forward during informal consultations. He therefore

proposed that the Committee suspend its debate on article 17 septies to allow time for further consideration of the new proposal.

The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.

Article 17 undecies (continued)

35. **Mr. Sorieul** (International Trade Law Division), referring to the proposal by the United States delegation, said that while the proposed formulation, by referring to a country other than that in which the court was located, would be appropriate in an article of an international convention, in the context of a model law it referred to a special jurisdictional case, since it was applicable within the borders of a State. He therefore suggested that in the text proposed by the United States delegation, the words "including in cases where the place of the arbitration proceedings is in a country other than the courts" be replaced with wording along the lines of "irrespective of whether the place of arbitration is in the territory of this State", based on article 1 (2) of the Arbitration Model Law, as set out in paragraph 23 of document A/CN.9/605.

36. The Chairman said that the wording suggested by the Secretariat was more in line with the language of model laws.

37. **Mr. Castello** (United States of America) said that the use of the words "irrespective of whether" as proposed by the Secretariat could imply that it did not matter whether or not the arbitration proceedings took place in another jurisdiction. It was his understanding that under article 17 undecies, a court would have no more power with respect to issuing interim measures for foreign arbitration proceedings than it did with respect to proceedings in a foreign court. By introducing the word "irrespective", the paragraph might be interpreted to mean that whatever power a court had to issue interim measures with respect to proceedings in its own courts would extend to any arbitration proceedings irrespective of whether those proceedings were domestic or foreign, which may not be the interpretation intended by the Working Group. Although his delegation had not had sufficient time to consider whether that was a serious concern, misinterpretation might be avoided altogether by retaining the words "including in cases where" and continuing with the words "the place of arbitration is in the territory of this State", as proposed by the Secretariat.

38. **Mr. Sorieul** (International Trade Law Division) said that the original formulation must be amended, since the paragraph referred to a State other than that in which the court was established and where national jurisdiction prevailed. The amendment now proposed by the representative of the United States would suggest the opposite of what the Commission intended to convey.

39. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said it was clear that the intent of the new formulation was to avoid the expansion of territorial competence, which was precisely the concern raised by the United States delegation. In principle, however, the new proposal was desirable, provided that those consequences could be avoided. He therefore proposed that the Committee discuss the possible implications of the new proposal in informal consultations.

40. **The Chairman** welcomed that suggestion.

41. **Ms. Perales Viscasillas** (Spain) drew attention to the fact that the words "*foro judicial*" appeared to have been introduced in the Spanish text of article 17 to refer to the court of a State, whereas the preceding articles used the word "*tribunal*" in accordance with the definitions set out in article 2 (c) of the Arbitration Model Law. It might be necessary to amend the Spanish text of those definitions to indicate that both "*tribunal*" and "*foro judicial*" meant a body of the judicial system of a State. The same issue might possibly arise in other language versions of the text.

Amendment to article 1, paragraph 2, of the Arbitration Model Law

Article 1

42. **The Chairman** invited the Commission to take up consideration of the amendment to article 1, paragraph 2, of the Arbitration Model Law proposed by the Working Group in paragraph 23 of document A/CN.9/605.

43. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that the inclusion in article 1, paragraph 2, of a reference to articles 17 novies and 17 decies was obviously necessary. However, it appeared that the inclusion of article 17

undecies would depend on the formulation that the Commission finally adopted for that article. He therefore proposed that a decision on the amendment be deferred until the Commission had finalized its discussion on article 17 undecies.

44. **The Chairman** expressed support for that suggestion. Since no further matters were pending in relation to document A/CN.9/605 on interim measures, he suggested that the Commission should suspend its meeting so as to hold informal consultations and finalize minor drafting details.

45. *It was so decided.*

The meeting rose at 12.30 p.m.

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